A **BANK ISLAM MALAYSIA BHD**

v.

HAMBIRA (M) SDN BHD & ORS

B HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CIVIL NOS: D4-22A-59-2004 & D4-22A-60-2004]
23 JANUARY 2007

C ***CIVIL PROCEDURE:*** *Discovery - Inspection of documents - Appeal against - Production of notice of demand - Whether relevant to plaintiff's claim - Whether pleaded by plaintiff - Whether second defendant entitled to demand notice for production and inspection - Whether material - Whether plaintiff could not refuse to produce notice of demand - Rules of*
D *the High Court 1980, O. 24 r. 10*

The second defendant had served a notice under O. 24 r. 10 of the Rules of the High Court 1980 upon the plaintiff to produce certain documents. The plaintiff complied, with the exception of
E the notice of demand asserted by the plaintiff in the statement of claim. Thereafter, the second defendant filed encl. 8 being a summons in chambers for production and inspection of documents. That application was allowed by the deputy registrar. Hence, encl. 13 was an appeal by the plaintiff against the order of the
F deputy registrar for discovery and inspection of documents. Notwithstanding the second defendant's repeated requests, the plaintiff failed to produce the notice of demand within the time limit stipulated under O. 24 r. 10 RHC or to object to the second defendant's request or to show any good cause as to why the
G notice of demand should not be produced. The plaintiff failed and/ or refused to produce the notice of demand on the following grounds (i) the notice of demand was not a material document for the plaintiff's cause of action and (2) the production and inspection application was unnecessary and irrelevant.

H **Held (dismissing the appeals):**

(1) The notice of demand was relevant to the plaintiff's claim. It was pleaded by the plaintiff. While it remained pleaded, the plaintiff could not refuse to produce it for inspection. It was
I reasonable for the second defendant to see it before he could put in his defence as the said notice would be able to demonstrate whether the plaintiff's action was time barred or

not, since time would begin to run from the date the notice of demand was issued for the purpose of the Limitation Act 1953. Without inspection of it, the second defendant would not be able to decide whether to plead the Limitation Act 1953 or not in his defence.

(2) The practice of pleadings provides that a party may plead as fact, such facts for which it had the evidence to support it. If it did not have the evidence, it could not plead it. The second defendant was entitled to demand the notice for production and inspection as it was material to the defence it would take. For so long as it remained pleaded, the plaintiff could not refuse to produce the notice of demand. The plaintiff could not plead it and at the same time be excused from producing it.

Legislation referred to:
Rules of the High Court 1980, O. 24 r. 10

For the plaintiff - Aida Rosina Mohd Saman; M/s Aziz Hassan & Co
For the 2nd defendant - PL Leong; M/s Sivananthan

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Wahab Patail J:

[1] Enclosure 13 is an appeal by the plaintiff to the judge in chambers against the order of the deputy registrar made on 10 January 2005 for discovery and inspection of documents.

[2] The solicitors for the 2nd defendant had served a notice under O. 24 r. 10 of the Rules of the High Court 1980 dated 10 August 2004 upon the plaintiff to produce certain documents. The plaintiff complied, with the exception of the notice of demand asserted by the plaintiff in para. 11 of the statement of claim.

[3] Thereafter, the 2nd defendant filed encl. 8 dated 1 October 2004 being a summons in chambers for production and inspection of documents. That application was allowed with costs by the deputy registrar on 10 January 2005. This appeal was filed on 20 January 2005.

[4] Nevertheless, notwithstanding the 2nd defendant's repeated requests, the plaintiff failed to produce the notice of demand within the time-limit stipulated under O. 24 r. 10 of the Rules of the High Court or to object to the 2nd defendant's request or to show any good cause as to why the notice of demand should not be produced.

[5] The plaintiff has failed and/or refused to produce the notice of demand on the following grounds:

(a) The notice of demand is not in the possession, custody or power of the plaintiff;

(b) The notice of demand is lost in view of the fact that it was issued long ago and it is difficult for the plaintiff to locate the relevant file;

(c) The notice of demand is not a material document for the plaintiff's cause of action; and

(d) The plaintiff is prepared to strike out para 11 of the statement of claim, hence, rendering the Production and Inspection Application unnecessary and irrelevant.

[6] On the date of hearing of the appeal on 16 June 2005, counsel for the plaintiff told the court:

> Benar dokumen berkenaan tiada dalam tangan Plaintif. Walau pun disebut dalam paragraph 11 Penyata Tuntutan.

[7] The notice of demand is relevant to the plaintiff's claim. It was pleaded by the plaintiff. If it is not, the plaintiff could amend the pleading to remove reference to the notice of demand. But while it remains pleaded, the plaintiff cannot refuse to produce it for inspection. It is reasonable for the 2nd defendant to see it before he puts in his defence as the said notice would be able to demonstrate whether the plaintiff's action is time-barred or not, since time would begin to run from the date the notice of demand was issued for the purpose of the Limitation Act 1953. The plaintiff itself admits that that demand was issued a long time ago. Without inspection of it, the 2nd defendant would not be able to decide whether to plead the Limitation Act 1953 or not in his defence.

[8] Further, if the plaintiff's appeal is allowed, the plaintiff is excused from production of the notice of demand. The document would not become available to be examined in relation to the application of the Limitation Act 1953, effectively denying the 2nd defendant that line of defence even though it is available.

[9] In conclusion, the practice of pleadings provides that a party may plead as fact, such facts for which it has the evidence to support it. If it does not have the evidence, it cannot plead it. A pleading as to a fact it cannot support with evidence when challenged must fact. The notice for production and inspection is such a challenge. The 2nd defendant is entitled to demand it as it is material to the defence it can take. For so long as it remains pleaded the plaintiff cannot refuse to produce the notice of demand. The plaintiff cannot plead it and at the same time be excused from producing it.

[10] The appeal in D4-22A-60-2004 are between the same parties and the same grounds.

[11] The appeals were, therefore, dismissed with costs.